

STATE OF MICHIGAN
COURT OF APPEALS

LINDA TREVINO and MARIO TREVINO,

Plaintiffs-Appellants,

v

FUAD H. TURFAH, M.D.,

Defendant-Appellee,

and

AMELIA GROVER, M.D., ALBERT LI, M.D.,
and WILLIAM BEAUMONT HOSPITAL,

Defendants.

UNPUBLISHED

September 19, 2006

No. 263999

Oakland Circuit Court

LC No. 2003-048398-NH

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right the summary dismissal of their medical malpractice claim against defendant, Dr. Fuad H. Turfah, on the ground that plaintiffs' expert was not qualified under MCL 600.2169 to render standard of care testimony against defendant.¹ This appeal was held in abeyance pending the decision in *Woodard v Custer*, ___ Mich ___, 719 NW2d 842 (Docket Nos. 124994, 124995, 126275, decided July 31, 2006), which has since been rendered. In accord with *Woodard* which held, in part, that a plaintiff's proposed standard of care expert must "match the one most relevant specialty" of the defendant, we affirm. See *id.*, slip op at 5.

Plaintiffs' cause of action arose from injuries allegedly sustained by Linda Trevino during a hemicolectomy to remove a mass from her colon, which resulted in postoperative complications. Defendant performed the surgery and allegedly failed to diagnose and treat these postoperative complications. He is board certified in general surgery and board certified in colon and rectal surgery. Plaintiffs filed an affidavit of merit executed by a physician who is board certified in general surgery only.

¹ Because Dr. Fuad H. Turfah is the only defendant appealing, we refer to him as "defendant" throughout this opinion.

Consequently, defendant filed a motion for summary disposition on the ground that plaintiffs' affidavit of merit failed to meet the requirements of MCL 600.2912d because their expert was not qualified to render an opinion against defendant, who was practicing as a board certified colon and rectal surgeon at the time of the alleged malpractice. The trial court denied the motion on the ground that, although plaintiffs' expert was not qualified to testify against defendant, plaintiffs could have reasonably believed their expert was qualified. When plaintiffs failed to name a qualified expert, defendant again moved for summary disposition. The trial court granted the motion, holding that plaintiffs failed to name an expert qualified to testify against defendant regarding the standard of care. See MCL 600.2169. This appeal followed.

Plaintiffs argue that the trial court abused its discretion in concluding that their expert was not qualified to render an opinion against defendant because defendant was practicing in the field of general surgery at the time of the alleged malpractice and plaintiffs' expert is board certified in general surgery. We disagree. We review de novo the trial court's decision to dismiss this matter. See *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). But, we review the trial court's ruling regarding the qualifications of a proposed expert witness to testify for an abuse of discretion. See *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 16 n 16; 651 NW2d 356 (2002).

The relevant portion of MCL 600.2169 provides:

(1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

In *Tate v Detroit Receiving Hosp*, 249 Mich App 212; 642 NW2d 346 (2002), this Court construed MCL 600.2169(1)(a) so as to require "an expert witness to possess the same specialty as that engaged in by the defendant physician during the course of the alleged malpractice." *Id.* at 220. In *Halloran v Bhan*, 470 Mich 572; 683 NW2d 129 (2004), our Supreme Court held that MCL 600.2169(1)(a) "requires that the expert witness 'must be' a specialist who is board certified in the specialty in which the defendant physician is also board certified." *Id.* at 579. That the plaintiffs' expert had the same subspecialty certificate in his respective field as the defendant doctor was not sufficient. *Id.* at 574. These holdings were cited with approval in *Woodard, supra*, slip op at 3-4, which explained,

Because the plaintiff's expert will be providing expert testimony on the appropriate or relevant standard of practice or care, not an inappropriate or irrelevant standard of practice or care, it follows that the plaintiff's expert witness must match the one most relevant standard of practice or care – the specialty engaged in by the defendant physician during the course of the alleged

malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty. [*Id.*]

Here, plaintiffs argue that the surgery that defendant performed on Linda Trevino, a hemicolectomy to remove a cecal mass, was within the expertise of a general surgeon. Accordingly, plaintiffs argue, their expert, a board certified general surgeon, was qualified to render expert testimony against defendant, a board certified general surgeon. Defendant has consistently argued, and the trial court agreed, that if malpractice occurred at all, it occurred while defendant was practicing as a colorectal surgical specialist, not a general surgeon. We agree with defendant and the trial court.

It is undisputed that defendant is board certified in colon and rectal surgery, as well as general surgery. See *Woodard, supra*, slip op at 4. Colon and rectal surgery is a specialty under the auspices of the American Board of Colon and Rectal Surgery, see www.abms.org/approved.asp, i.e., "an official group of persons who direct or supervise the practice of medicine that provides evidence of one's medical qualifications." *Woodard, supra*. As explained by the American Board of Colon and Rectal Surgery,

A board certified colon and rectal surgeon has successfully completed at least a five year ACGME approved training program in general surgery and one additional year in an ACGME approved colon and rectal surgery residency. He/she has then passed both the Written (Qualifying) and Oral (Certifying) Examinations given by the American Board of Colon and Rectal Surgery.

* * *

In addition to having proficiency in the field of general surgery, colon and rectal surgeons have acquired particular skills and knowledge with regard to the medical and surgical management of diseases of the intestinal tract, colon and rectum, anal canal, and perianal area. [www.abcrs.org/definitionofsurgeon.htm.]

It is uncontested that plaintiffs' expert is not board certified in colon and rectal surgery. Plaintiffs' claim, however, is that defendant was not engaged in his colorectal surgical specialty at the time of the alleged malpractice. See *Woodard, supra*, slip op at 3; *Tate, supra*. But, plaintiffs' allegation is that defendant injured or perforated Linda Trevino's colon during colon surgery and, as a consequence, subsequent surgical repairs were required and associated damages were sustained. That a general surgeon may have been able to perform the same surgical procedures does not establish that defendant was not practicing as a board certified colon and rectal surgeon at the time of the alleged malpractice. Defendant performed surgery on Linda Trevino's colon, hence, he was performing as a colorectal surgical specialist during the surgery and throughout the postoperative care process. See *Woodard, supra*. Therefore, plaintiffs were required, under MCL 600.2169(1)(a), to offer a standard of care expert who was a board certified colon and rectal surgeon. See *id.* Accordingly, the trial court did not abuse its discretion when it

held that plaintiffs' proposed standard of care expert, a board certified general surgeon, was not qualified to render an expert opinion against defendant. Thus, defendant's motion for summary disposition was properly granted.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane E. Markey